UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GABRIEL GONZALEZ,
Petitioner,
vs.
JIM BENEDETTI, et al.,
Respondents.

Case No. 3:10-cv-00695-HDM-VPC

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#7), respondents' answer (#21), and petitioner's reply (#22). The court finds that relief is not warranted, and the court denies the petition.

Procedural History

In state district court, petitioner was charged with one count of trafficking in a controlled substance and one count of conspiracy to trafficking in a controlled substance. Ex. 29 (#10). After a trial, the jury found him guilty of trafficking in a controlled substance. Ex 37 (#11). The trial court entered its amended judgment of conviction on January 10, 2007. Ex. 42 (#11). Petitioner appealed. The Nevada Supreme Court affirmed on March 6, 2008. Ex. 51 (#11).

Petitioner then filed in state district court a post-conviction habeas corpus petition on September 18, 2008. Ex. 55 (#12). The state district court denied the petition on November 10, 2009. Ex. 64 (#12). Petitioner appealed. The Nevada Supreme Court affirmed on September 10, 2010. Ex. 71 (#12). The federal habeas corpus petition (#7) followed.

Facts

Clarence Andreozzi was facing charges of possession of drug paraphernalia. He agreed with the police to arrange a controlled purchase of cocaine, so that the police could arrest a supplier of the drug. In return, the police would drop the charges against him.

Andreozzi contacted Marrio Williams and arranged the transaction. In the telephone conversations between the two, Williams said that petitioner was the source of the cocaine. Eventually, the two agreed that Andreozzi would meet Williams and petitioner at a parking lot in Lovelock, Nevada, for the transaction.

The meeting occurred as planned. The police were near, but hidden, and they could not see the transaction themselves. Andreozzi was wearing a hidden transmitter, but it did not work very well, and the recording provided no useful information. Williams testified that petitioner drove Williams' car from Reno, Nevada, to Lovelock. Williams sat in the back seat. Petitioner's girlfriend, Jannet Ordaz, accompanied them, and she sat in the front passenger seat. Andreozzi and Williams testified that Andreozzi approached the car, handed pre-recorded purchase money to petitioner, and received one ounce of cocaine in return. Williams

also testified that when petitioner took out the cocaine to give to Andreozzi, petitioner dropped the bag. Williams picked the bag up and handed it back to petitioner, who gave it to Andreozzi.

After Andreozzi walked away from the car, petitioner started to drive away. The police intercepted petitioner in the parking lot. They arrested petitioner, Williams, and Ordaz. They recovered the pre-recorded purchase money from petitioner. They also found several grams of cocaine in Ms. Ordaz's purse.

Williams had not been working with the police before the arrest, but he agreed to provide testimony against petitioner.

Ordaz ultimately pleaded no contest to trafficking in a controlled substance.

Standard of Review

Congress has limited the circumstances in which a federal court can grant relief to a petitioner who is in custody pursuant to a judgment of conviction of a state court.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, 131 S. Ct. 770, 784 (2011).

> Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision "was contrary to" federal law then clearly established in the holdings of this Court, § 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); or that it "involved an unreasonable application of" such law, § 2254(d)(1); or that it "was based on an unreasonable determination of the facts" in light of the record before the state court, § 2254(d)(2).

Richter, 131 S. Ct. at 785. "For purposes of § 2254(d)(1), 'an unreasonable application of federal law is different from an incorrect application of federal law.'" Id. (citation omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Id. (citation omitted).

> [E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

> Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.

Richter, 131 S. Ct. at 786.

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id., at 786-87.

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Discussion

Grounds 1, 2 and 3 are claims of error in the trial court. Petitioner did not present these claims on direct appeal. He did present the claims in his state habeas corpus petition. The state district court and the Nevada Supreme Court construed these claims as claims of ineffective assistance of counsel. Nonetheless, the court presumes that the state courts considered the merits of the underlying claims. Johnson v. Williams, 133 S. Ct. 1088, 1094 (2013). Indeed, the state courts' analyses of whether petitioner suffered any prejudice are analyses on the merits of the claims.

Ground 1 is a claim that petitioner is actually innocent. On this issue, the Nevada Supreme Court held:

> Fourth, appellant claimed that his appellate counsel was ineffective for failing to argue that he was innocent and for raising only frivolous arguments. Appellant failed to demonstrate that he was prejudiced. A review of the record reveals sufficient evidence to establish appellant's guilt beyond a reasonable doubt, Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998), thus he failed to demonstrate that a claim of innocence would have had a reasonable likelihood of success on appeal. Further, he failed to demonstrate that he was prejudiced by his appellate counsel's failure to raise any additional claims. Therefore, the district court did not err in denying this claim.

Ex. 71, at 4 (#12). The Supreme Court of the United States has not determined whether a free-standing claim of actual innocence exists in federal habeas corpus. District Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2321 (2009); Herrera v. Collins, 506 U.S. 390, 398-417 (1993)). Without any clearly established federal law on the issue, the Nevada Supreme Court's determination cannot be contrary to, or an unreasonable application of, clearly established federal law. Carey v. Musladin, 549 U.S. 70, 77 (2006). Ground 1 is without merit.

Ground 2 is a claim that the prosecution knowingly used perjured testimony to convict petitioner. Napue v. Illinois, 360 U.S. 264, 269-70 (1959); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam). On this issue, the Nevada Supreme Court held:

> Third, appellant claimed that his appellate counsel was ineffective for failing to argue that the State knowingly used perjured testimony to convict him. Appellant failed to demonstrate that his appellate counsel's performance was deficient. Nothing in the record supports appellant's claim that the State knew two witnesses committed perjury. Appellant's bare and naked claims are insufficient to demonstrate that he is entitled to relief for this claim. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Therefore, the district court did not err in denying this claim.

Ex. 71, at 4 (#12).

Petitioner argues that at sentencing the trial judge stated that Williams and Andreozzi committed perjury. This is what the judge actually said:

> What I am telling you is that the evidence before this Court, and I take judicial notice of everything that came out in the trial, is that you were involved with a group of people in Reno. One of those, who happened to live in Battle Mountain, he got caught with drugs. Within the drug world, there are no loyalties. It's a world of deception and lies and cheating and no loyalty. The only loyalty that you have are the people sitting in the courtroom, your family.
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> Where are your friends? Where are your friends that you were involved with the drug dealing and all that? I don't see them in the in courtroom. And they will never be here. They abandon—they abandon those who get caught, because they know that they are next and that they could be in that same position. So the people that you came here with, um, you may still consider your friends. But I'm telling you the way this entire system, and it's a pretty ugly system, works. It's like one person gets caught and it's like tag. They catch the next person and clear on down the line. And you were it. And that's what it is today.

Ex. 40, at 37-38 (#11). Petitioner takes the judge's statements out of context. The judge did not state that Williams and

Andreozzi testified falsely. The judge expanded upon the old aphorism that there is no honor among thieves.

Furthermore, petitioner has not proven that the testimony in question was perjured. Petitioner has shown minor inconsistencies between the testimony of Williams and the testimony of Andreozzi, but minor inconsistencies occur often when two different people testify about their own recollections of the same event. Other than petitioner's own statement that Andreozzi and Williams perjured themselves, nothing in the record supports that argument. Even if petitioner testified at trial to a different version of events, that testimony would not prove that Andreozzi and Williams perjured themselves. Furthermore, the officers testified that they knew before the transaction that Williams was not the drug dealer, but that he was the facilitator between Andreozzi and petitioner. The officers also testified that Williams was not working for them, and that Williams agreed to testify against petitioner only after Williams was arrested. For petitioner's claim to be true, there would have to be evidence of a conspiracy between Williams and Andreozzi to frame petitioner for a crime. There is no evidence of such a conspiracy. Consequently, the Nevada Supreme Court reasonably could have determined that the prosecution did not know that it was using perjured testimony; it also reasonably could have determined that petitioner had not proven that the testimony was perjured. Ground 2 is without merit.

In ground 3, petitioner claims that the third amended information did not give petitioner notice that the prosecution would pursue the theory of aiding and abetting for the charge of

trafficking in a controlled substance. On this issue, the Nevada Supreme Court held:

> First, appellant claimed that his trial counsel was ineffective for failing to argue that the State did not provide notice of criminal liability under an aider and abettor theory. Appellant cannot demonstrate that his trial counsel was deficient because, in the third amended information, the State charged appellant with trafficking in a controlled substance and listed NRS 195.020, which states that one who aids or abets shall be punished as a principal. Appellant failed to demonstrate prejudice because the evidence showed that he personally sold the cocaine to the police informant. Therefore, the district court did not err in denying this claim. . . .
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> Second, appellant claimed that his appellate counsel was ineffective for failing to argue that the State did not provide notice of criminal liability under an aider and abettor theory. As discussed previously, the State charged appellant as an aider and abettor in the third amended information. Accordingly, appellant failed to demonstrate that the underlying issue had a reasonable likelihood of success on appeal. Therefore, the district court did not err in denying this claim.

Ex. 71, at 2, 4 (#12). Count 1 of the third amended information does give petitioner notice of the theory of aiding and abetting. Ex. 29, at 1 (#10). Ground 3 has no support in the record. The Nevada Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established federal law.

Ground 4 contains three claims of ineffective assistance of trial counsel. "[T]he right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970). A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense attorney's representation "fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced the defendant such that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

Strickland expressly declines to articulate specific guidelines for attorney performance beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the duty to advocate the defendant's cause, and the duty to communicate with the client over the course of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's duties so exhaustively as to give rise to a "checklist for judicial evaluation of attorney performance. . . . Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-89.

Review of an attorney's performance must be "highly deferential," and must adopt counsel's perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight." Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (citation omitted).

The Sixth Amendment does not guarantee effective counsel per se, but rather a fair proceeding with a reliable outcome. See

Strickland, 466 U.S. at 691-92. See also Jennings v. Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell below an objective standard of reasonableness alone is insufficient to warrant a finding of ineffective assistance. The petitioner must also show that the attorney's sub-par performance prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that, but for the attorney's challenged conduct, the result of the proceeding in question would have been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so . . . . The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citations omitted).

The court uses respondents' designations for the claims of ineffective assistance. In ground 4(1), petitioner argues that counsel failed to question Williams or Andreozzi about their prior criminal records. On this issue, the Nevada Supreme Court held:

> Third, appellant claimed that his trial counsel was ineffective for failing to impeach M. Williams' testimony with his criminal history. Appellant cannot demonstrate that his trial counsel's performance was deficient because counsel attempted to question the witness in this area, but the district court precluded questioning of this nature due to the

> age of the conviction. See NRS 50.095(2). Therefore, the district court did not err in denying this claim.

Ex. 71, at 2-3 (#12). The transcript shows that counsel did try to cross-examine Williams about a prior felony conviction. The trial court did not allow the questioning because the prior conviction was too old to qualify under Nev. Rev. Stat. § 50.095. Ex. 34, at 37-40 (#11). Counsel could have done nothing else. Counsel also cross-examined Andreozzi on the one item that would be the most impeaching: Andreozzi's deal with police not to be charged in exchange for setting up the transaction. Ex. 33, at 54 (#11). The court agrees with respondents that petitioner has not presented any evidence that Andreozzi had a criminal history that would have been admissible pursuant to Nev. Rev. Stat. § 50.095. The Nevada Supreme Court applied Strickland reasonably.

In ground 4(2), petitioner claims that counsel failed to call Janet Ordaz to testify on petitioner's behalf. On this issue, the Nevada Supreme Court ruled:

> Second, appellant claimed that his trial counsel was ineffective for failing to call J. Ordaz to testify because she could have provided an alibi. Appellant failed to demonstrate that he was prejudiced. As Ordaz was in the vehicle with appellant during the drug transaction and appellant was seen by numerous police officers participating in the sale of cocaine, appellant failed to demonstrate that she could have provided an alibi for appellant. Given the evidence produced at trial, appellant failed to demonstrate a reasonable probability that the outcome of the trial would have been different had Ordaz testified at his trial. Therefore, the district court did not err in denying this claim.

Ex. 71, at 2 (#12). To the extent that petitioner claimed that Ordaz could have provided an alibi, the Nevada Supreme Court was

correct.[1] Police officers found both petitioner and Ordaz in the car. Ordaz could not have testified that petitioner was elsewhere. However, petitioner alleged in ground 4 of his state habeas corpus petition, and he alleges in ground 4 of his federal petition, that Ordaz was "an eyewitness and/or alibi witness." The Nevada Supreme Court's decision does not address counsel's decision not to call Ordaz for her eyewitness testimony of events. The state district court did address that contention. It held:

> Here, Petitioner fails to overcome the presumption that trial counsel's decision was not based upon prudent trial strategy. The record demonstrates that Ms. Ordaz was with petitioner when he provided cocaine to the cooperative source. Upon arresting Ms. Ordaz and Petitioner, detectives found several grams of cocaine in Ms. Ordaz's purse. This discovery ultimately resulted in Ms. Ordaz being convicted of Trafficking in a Controlled substance. These facts constitute reasonable grounds for trial counsel not to call Ms. Ordaz to testify. Rather than risk the jury imputing Ms. Ordaz's guilt to Petitioner, trial counsel made the tactical decision not to call her to the stand. Accordingly, Petitioner's trial counsel did not provide ineffective assistance of counsel.

Ex. 64, at 5-6 (#12). The court presumes that the Nevada Supreme Court rejected petitioner's claims for the same reason. See Williams, 133 S. Ct. at 1094. Counsel's strategy was to argue that Williams actually was the trafficker, and that the police charged the wrong man with the more serious crime. That strategy would have become more difficult if the jury learned that petitioner's girlfriend, not Williams, was in possession of cocaine. Consequently, the state-court determination was a reasonable application of Strickland.

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[1] Perhaps petitioner was using the term "alibi" incorrectly, to mean that Ordaz would have testified that petitioner was not the person who sold cocaine to Andreozzi.

In ground 4(3), petitioner claims counsel did not object to the theory of aiding and abetting because the third amended information did not put him on notice of that theory. The Nevada Supreme Court determined that this claim lacked merit because the third amended information did put petitioner on notice of the theory of aiding and abetting. Ex. 71, at 2, 4 (#12).[2] The Nevada Supreme Court's determination that counsel did not perform deficiently was a reasonable application of Strickland.

Conclusion

To appeal the denial of a petition for a writ of habeas corpus, Petitioner must obtain a certificate of appealability, after making a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). After reviewing its decision, the court concludes that reasonable jurists would not find its conclusions to be debatable or wrong. The court will not issue a certificate of appealability.

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[2]The court has quoted that decision in its discussion of ground 3, above.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus (#7) is **DENIED.** The clerk of the court shall enter judgment accordingly.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED.**

DATED: March 6, 2014.

Howard D McKibben

HOWARD D. MCKIBBEN
United States District Judge